IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.454 OF 2002

IN

SUIT NO.475 OF 2002

BANK OF MAHARASHTRA,
a body corporate constituted
under the Banking Companies
(Acquisition and Transfer of
Undertakings) act, 1976, having
its Head Office at Lok Mangal,
1501, Shivaji Nagar, Pune-5,
and its Overseas branch at
Mittal Court, Nariman Point,
Mumbai - 400 021 on behalf of
themselves and all other creditors
of Bagwe Udyog Ltd. ...Plaintiffs

Versus

1.BAGWE UDYOG LTD.,
a limited company incorporated
under the Companies Act, 1956,
having its Regd.Office at 311,
Plot No.1, 1st Floor, Near Panvel
S.T.Stand, Mumbai-Pune Road,
Panvel, Dist.Raigad,
Pin 410 206 and office at
15-D, M.I.D.C., Central Board,
Near SEEPZ, Andheri (East),
Mumbai - 400 093.

2.M/S.DEVIKA TRADING CO.PVT.LTD.,
a company incorporated under
the Companies Act, 1956, having
its office at 9/26-B, Kandke Building,
R.K.Vaidya Road, Dadar, Mumbai 400 028.

3.SUB-REGISTRAR OF ASSURANCES,
having his office at
Old Custom House, Mumbai. ...Defendants

.....

Mr.Hiralal Thakkar, Sr.Counsel with Ms.Sharila D'Souza i/b M/s.Umesh Shetty & Co. for Applicants/Plaintiffs.

Mr.P.Ganvani with Mr.A.B.Nagvekar i/b M/s.Soloman & Co. for Defendant No.1.

Mr.D.D.Madon, Sr.Counsel with Mr.Aliabbas Delhiwala i/b M/s.Kanga & Co. for Defendant No.2.

.....

CORAM : A.M.KHANWILKAR, J.

DATE OF RESERVING)
THE ORDER) : 11/04/2007.

DATE OF PRONOUNCING)
THE ORDER) : 06/06/2007.

ORDER :

1. This Order will dispose of prayer for interim relief as pressed in the Notice of Motion filed by the Plaintiffs during the pendency of the Suit. The subject Suit has been filed by the Plaintiffs, essentially for declaration and injunction on the claim founded on Section 53 of The Transfer of Property Act, 1882 (hereinafter referred to as 'the Act'). The Plaintiff Bank is one of the creditor of the Defendant No.1 Company. According to the Plaintiffs, they had filed Suit for recovery of a sum of Rs.4,48,39,822/- (Rupees

Four Crores Forty-eight Lakhs Thirty-nine Thousand Eight Hundred Twenty-two Only) in this Court against the Defendant No.1 and others being Suit No.4880 of 1998. After the coming into force of the Recovery Of Debts Due To Banks & Financial Institutions Act, 1993 and establishment of the Debts Recovery Tribunal ("D.R.T."), Mumbai in or about October 1999, the said Suit stood transferred to D.R.T.-II, Mumbai and was renumbered as original Application No.1402 of 1999. According to the Plaintiffs, as can be discerned from Paragraph 7 of the Plaint, in the first week of October 1999, they learnt from reliable sources that the Defendants in the said Suit were trying to dispose of their properties to frustrate the claim of the Plaintiffs. For that reason, Plaintiffs moved an application on 13th October 1999, praying for interim relief of injunction against the Defendants in the said proceedings, restraining them from disposing of and/or parting with possession and/or alienating, encumbering and/or creating any right, title or interest in favour of anyone else in respect of and/or inducting anyone into all their properties including their right, title and

interest in the properties as more particularly described in the Schedule being Exhibit ‘A’ to the said Application, which included immovable property which is the subject matter of the present Suit. The Plaintiffs assert that on 14th October 1999, the D.R.T. was pleased to pass order of injunction against Defendant No.1 herein in the following terms:

> "Issue temporary injunction against the Defendants that until further orders, they shall not dispose of, alienate, mortgage, transfer or create a charge of any sort over their properties, including the properties in the present loan transaction."

2. The Plaintiffs assert that the said order of injunction was sent by the Plaintiffs under the cover of their letter dated 19th November 1999 to the City Survey Officer, Santacruz (West), Mumbai, intimating the City Survey Office about passing of the injunction order in respect of the property in question. According to the Plaintiffs’ noting regarding the said injunction order has been made in the property register card on 3rd December 1999

in respect of the said property. The Plaintiffs further assert that by letter dated 11th January 2000, the Plaintiffs wrote to the City Survey Office for issuance of Index-II after recording injunction order passed by the D.R.T. The Plaintiffs also sent letter to Defendant No.3 with request not to register/accept for registration any document for transfer of the property in question at the instance of Defendant No.1 without prior intimation to the Plaintiffs. After all this, the Plaintiffs claim to have published public notice in the English Newspaper Indian Express dated 29th January 2001. The Plaintiffs further assert in Para 13 of the Plaint that in or about third week of January 2000, the Plaintiffs learnt that Defendant No.1 with a view to defraud the Plaintiffs and all other creditors vide a purported Deed of Assignment dated 17th September 1999 executed on a non-judicial stamp paper of Rs.100/- (Rupees One Hundred), purportedly assigned all their right, title and interest in the immovable property in question to the Defendant No.2 for a meagre consideration of Rs.24,50,000/- (Rupees Twenty-four Lakhs Fifty Thousand) as against the

estimated market value of the said property to be over Rs.1,00,00,000/- (Rupees One Crore). The Plaintiffs have summed up the circumstances in Para 27 of the Plaint, which according to them would suggest that the transaction in respect of the immovable property in favour of Defendant No.2 by the Defendant No.1 was fraudulent one. It will be apposite to refer to Para 27 of the Plaint, which reads thus:

> "27. The Plaintiffs state and submit that the aforesaid entire transaction concerning the purported Deed of Assignment purportedly dated 17.9.1999 whereby the Defendant No.1 purportedly transferred the said immovable property described in Exhibit 'A' hereto to the Defendant No.2 for the alleged consideration of Rs.24,50,000/- and also the said purported registration of the said purported Deed of Assignment affected by the Defendant No.3 is fraudulent, sham, false, bogus, bad in law, null and void and not binding upon the Plaintiffs and all other creditors of the Defendants No.1 is interalia proved from the following facts:
>
> (i) The said purported Deed of Assignment dated 17.9.1999 was executed on a non-judicial stamp paper of Rs.100/- only.
>
> (ii) In the consideration clause of the said purported Deed of Assignment where the said purported consideration of Rs.24,50,000/- is purportedly recorded, it

is not even mentioned as to whether the said purported consideration on Rs.24,50,000/- was received by cash or cheque.

(iii) On the date of the said purported Deed of Assignment i.e. on 17.9.1999, indisputably, even the alleged meagre consideration of Rs.24,50,000/- (which was much below the market value of the said immovable property which was above Rs.1 Crore) was not even received/realised by the Defendants No.1.

(iv) The Defendants No.1 purportedly recorded the receipt of the said purported consideration by the various purported cheques purportedly issued by the Defendants No.1 by a purported letter dated 17.9.1999. Noticeably, in the said letter, despite the fact that the said purported cheques recorded in the said letter were yet to be encashed on the said date, the said Defendant No.1 chose to record that they received from the Defendants No.2 full consideration money of Rs.24,50,000/- as per the aforesaid purported Deed of Assignment. A copy of the said purported letter dated 17.9.1999 is to be found as Exhibit ‘4’ of the aforesaid Misc.Application bearing Lodg.No.484 of 2001 moved by the Defendant No.2 in the Hon’ble DRT. In this connection, it is noteworthy that even as per the letter dated 17.9.1999 purportedly addressed by the Defendants No.2 to the Defendants No.1 (being Exhibit ‘3’ to the Interim Application moved by the Defendants No.2 in DRT), the said sum of Rs.24,50,000/- was purportedly paid by the Defendants No.2 to the Defendants No.1 by way of five separate cheques drawn upon single account of the Defendant No.2 maintained with the Union Bank of India, the said act on the part of the Defendants No.2 smacks of collusion with the Defendants No.1 in the said fraudulent

transaction.

(v) At the time of lodgment of Deed of Assignment dated 17.9.1999, the Defendants No.1 as aforesaid, had not even obtained the requisite Income Tax Clearance Certificate as contemplated under Section 230A of Income Tax Act.

(vi) The order of DRT passed on 14.10.1999 was communicated by the Plaintiffs to the City Survey Office, as aforesaid, by their letter dated 19.11.1999 and the entry thereof was also recorded by the City Survey Office on 3.12.1999.

(vii) The office of the Defendant No.3 was also informed about the said order of injunction by the Plaintiffs' letters dated 11.01.2000 and 27.01.2000 addressed to the Defendant No.3. Even as per the acknowledgement of the Defendant No.3, the copy of the said letter dated 27.1.2000 was received by the Defendant No.3 on 8.2.2000.

(viii) The aforesaid requirement of the Income Tax Clearance Certificate under Section 230A of the said Income Tax Act, 1961 was done away by way of an amendment vide Finance Act, 2001 which came into effect only on 1.06.2001.

(ix) At least on 8.2.2000, even as per the aforesaid acknowledgement dated 8.2.2000 on the aforesaid letter dated 27.1.2000, the Defendant No.3 was aware of the passing of the said order of injunction which was passed as early as on 14.10.1999 by the Hon'ble DRT preventing the Defendants No.1 from selling/transferring/assigning any of their immovable properties including the immovable property covered by the said purported Deed of Assignment.

(x) Consequently, as on 8.2.2000, it was

well within the knowledge of the Defendants No.3 that in the aforesaid premises and especially in view of the non-removal of the objections pertaining to the market value of the said immovable property covered by the said purported Deed of Assignment and compliance of the said Section 230A of the Income Tax Act, 1961 by the Defendant Nos.1 and 2 even as on the said date i.e. on 8.2.2000, the said purported Deed of Assignment dated 17.9.1999 had continued to remain unregistered and consequently, the immovable property covered by the said Deed continued to be the property of the Defendants No.1.

(xi) The Defendant No.3 was also well aware of the fact that in the aforesaid premises, in the teeth of the aforesaid order of injunction dated 14.10.1999 passed by the Hon'ble DRT, it was not at all permissible on the part of the Defendant No.3 to effect registration of the said purported Deed of Assignment on 30.8.2001 or any time after the intimation of the aforesaid order which as aforesaid, was intimated to the Defendant No.3 vide the copies of the aforesaid letters dated 11.1.2000 and 27.1.2000.

(xii) Even as per the present market value, on a conservative estimate, the value of the said property in question is well above Rs.1 Crore. The said fact is evident from the valuers report dated 11.12.2001 issued by the government approved valuer N.G.Vaidya and Associates and also a letter of offer dated 24.1.2002 received by the Plaintiffs from one M/s.Sanghvi Pack Products. In the said valuation report, the said valuers have stated that in their opinion, the prevailing market rate of commercial premises in the area (where the aforesaid suit property covered by the said purported Deed of Assignment) ranged

> Rs.3500/- to Rs.4000/- per sq.ft. of built up area. From the reading of the aforesaid purported Deed of Assignment it may be noted that the 2nd floor premises forming part of the said property admeasures approximately 3800 sq.ft. By the said letter of offer, the said M/s.Sanghvi Pack Products have offered to purchase the said suit property for Rs.1,05,00,101/- only. Hereto annexed and marked EXHIBITS "L" and "L-1" are copies of the said valuation report dated 11.12.2001 and the said letter of offer dated 24.1.2002 respectively."

3. On these assertions, the Plaintiffs have approached this Court for the following reliefs:

> "(a) that this Hon'ble Court be pleased to declare that the said purported assignment of the said immovable property described in Exhibit 'A' hereto, purportedly effected by the Defendant No.1 in favour of the Defendant No.2 under the purported Deed of Assignment dated 17.09.1999 is fraudulent, illegal, invalid, null and void, bad in law and not binding upon the Plaintiffs and any other creditors of the Defendants No.1.
>
> (b) that this Hon'ble Court be pleased to declare that the purported registration of the said purported Deed of Assignment dated 17.9.1999 purportedly effected by the Defendant No.3 on 30.8.2001 is illegal, invalid, null and void, bad in law and not binding upon the Plaintiffs and any other creditors of the Defendants No.1.

(c) that this Hon'ble Court be pleased to pass an order and decree quashing and setting aside the aforesaid fraudulent assignment of the said immovable property, described in Exhibit 'A' hereto, purportedly effected by the Defendant No.1 to the Defendant No.2 under the purported Deed of Assignment dated 17.9.1999.

(d) that this Hon'ble Court be pleased to pass a mandatory order and injunction against the Defendant No.3 ordering and directing the said Defendant No.3 to cancel the said purported registration of the said purported Deed of Assignment being Exhibit 'G' to the Plaint purportedly effected on 30.8.2001 by the Respondent No.3.

(e) that this Hon'ble Court be pleased to pass permanent order and injunction restraining the Defendants No.1 from selling/alienating/transferring the said immovable property described in Exhibit 'A' hereto or creating any encumbrances or any third party rights upon/in respect of the said immovable property described in Exhibit 'A' hereto.

(f) that this Hon'ble Court be pleased to pass a permanent order and injunction restraining the Defendants No.2 from selling/alienating/transferring the said immovable property described in Exhibit 'A' hereto or creating any encumbrances or any third party rights upon/in respect of the said immovable property described in Exhibit 'A' hereto.

(g) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order and injunction restraining the Defendants No.1 from selling/alienating/transferring the said immovable property described in Exhibit

‘A’ hereto or creating any encumbrances or any third party rights in respect of the said immovable property described in Exhibit ‘A’ hereto.

(h) that pending the hearing and final disposal of the suit, this Hon’ble Court be pleased to pass an order and injunction restraining the Defendants No.2 from selling/alienating/transferring the said immovable property described in Exhibit ‘A’ hereto or creating any encumbrances or any third party rights in respect of the said immovable property described in Exhibit ‘A’ hereto.

(i) that pending the hearing and final disposal of the suit, this Hon’ble Court be pleased to issue a mandatory order and injunction ordering and directing the Defendant No.3 to pass necessary orders suspending the purported registration of the said purported Deed of Assignment being Exhibit ‘G’ to the Plaint purportedly effected by the Defendant No.3 on 30.8.2001.

(j) that this Hon’ble Court be pleased to grant leave under Order 1 Rule 8 of C.P.C. 1908 to the Plaintiffs to file the present representative suit on behalf of themselves and all the creditors of the Defendants No.1.

(k) that this Hon’ble Court be pleased to grant leave under Section 80(2) of the Code of Civil Procedure, 1908 and permit the Plaintiffs to file the present suit without serving notice as required under Sub-Section (i) of the said Section 80 of the CPC, 1908.

(l) for ad-interim reliefs in terms of prayer clauses (g), (h) and (i) above.

(m) for such other reliefs as the nature and circumstances of the case may require.

(n) for costs of the suit."

4. During the pendency of this Suit, the Plaintiffs have taken out present Notice of Motion for the following reliefs:

> "(a) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order and injunction restraining the Defendants No.1 from selling/alienating/transferring the said immovable property consisting of 1/3rd undivided right title and interest in the premises as available FSI to the extent of 341.5 sq.mtrs. or thereabouts in all that piece or parcel of land lying, being and situate at Village Vyarawali, Taluka Andheri, bearing C.T.S. No.150, Survey No.6, Hissa No.Nil admeasuring 1070.2 sq.mtrs. within the registration Sub-District and District of Bombay City and Bombay Suburban with the building structure standing thereon, together with the benefit of and alongwith the right to use and occupy the second floor admeasuring about 3800 sq.ft. built up area and more particularly described as Exhibit 'A' to the Plaint or creating any encumbrances or any third party rights upon/in respect of the said immovable property.
>
> (b) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to place an order and injunction restraining the Defendants No.2 from selling/alienating/transferring the said immovable property consisting of 1/3rd undivided right title and interest

in the premises available FSI to the extent of 341.5 sq/mtrs. or thereabouts in all that piece or parcel of land lying, being and situate at Village Vyarawali, Taluka Andheri, bearing C.T.S. No.150, Survey No.6, Hissa No.Nil admeasuring 1070.2 sq.mtrs. within the registration Sub-District and District of Bombay City and Bombay Suburban with the building structure standing thereon, together with the benefit of and along with the right to use and occupy the second floor admeasuring about 3000 sq.ft. built up area and more particularly described in Exhibit 'A' to the Plaint or creating any encumbrances or any third party rights upon/in respect of the said immovable property.

(c) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to issue a mandatory order and injunction ordering and directing the Defendant No.3 to pass necessary orders suspending the purported registration of the said purported Deed of Assignment dated 17.9.1999, being Exhibit 'G' to the Plaint, purportedly effected by the Defendant No.3 on 30.8.2001.

(d) for ad-interim reliefs in terms of prayers (a), (b) and (c) above.

(e) for costs of the notice of motion.

(f) for such further and other reliefs as the nature and circumstances of the case may require."

5. The Defendants have filed reply affidavit to oppose grant of any interim relief during the pendency of the Suit as prayed by the Plaintiffs.

Initially, the Court after considering the pleadings and the rival submissions was pleased to dispose of the Notice of Motion by oral order dated February 14, 2002. The said decision, however, was challenged by the Plaintiffs before the Appellate Bench of this Court. The Appeal was, however, disposed of by consent of the parties vide order dated November 24, 2006 by the Division Bench in Appeal No.275 of 2002 on the following terms :

> "After arguing the matter for sometime, the senior counsel for the parties agreed for disposal of the appeal by the following order:-
>
> (i) Notice of Motion No.454 of 2002 is restored to file.
>
> (ii) The respondent no.2 (defendant no.2) shall file reply to the Notice of Motion within four weeks from today with an advance copy to the Advocates on record for the appellant (plaintiff).
>
> (iii) The plaintiff shall be at liberty to file rejoinder within three weeks from the date of receipt of the copy of the reply affidavit from the defendant no.2.
>
> (iv) The learned Motion Judge is requested to hear and decide the Notice of Motion afresh.
>
> (v) Until the disposal of the Notice of Motion, interim order passed in appeal on 19.3.2002 as modified on 27.8.2002 in

Notice of Motion No.2076 of 2002 (in the Appeal) shall remain operative.

(vi) The impugned order stands set aside with the aforesaid direction.

(vii) All contentions of the parties are kept open to be agitated before the learned Motion Judge.

No costs."

6. Pursuant to the said decision, parties are relegated before the Single Judge of this Court for reconsideration of the Notice of Motion afresh.

7. Accordingly, this Court will have to consider:

i) Whether the Plaintiffs have made out a prima facie case?

ii) Whether the balance of convenience is in favour of the Plaintiffs?

iii) Whether the Plaintiffs will suffer irreparable loss?

iv) What order?

8. Before proceeding to consider the rival claim, at the outset, it needs to be noted that the declaration claimed by the Plaintiffs in the present Suit is essentially founded on grounds available in terms of Section 53 (1) of the Act. Section 53 of the Act reads thus :

> **"53. Fraudulent transfer.-**(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which terms includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

53A.Part performance.- Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

9. There can be no difficulty in accepting the argument of the Plaintiffs that if the Plaintiffs were to allege and prove that the transfer of immovable property in question has been made by Defendant No.1 in favour of Defendant No.2 with intent to defeat or delay the creditors of the Defendant No.1, said transaction shall be voidable at the option of the Plaintiffs whose claim against the Defendant No.1 was likely to be defeated or delayed. I shall revert to this aspect a little later. What is however significant in Section 53 of the Act is that such right of the creditor is not an absolute right. For, the same is made subject to the right of the transferee of such immovable property in good faith and for consideration. In other words, if the transferee such as Defendant No.2 alleges and proves that it had purchased the property in good faith and for consideration, the question of Creditor (Plaintiffs) succeeding in getting declaration in terms of Section 53 of the Act will not arise.

10. Going by the averments in the Plaint, and

even on fair reading thereof, it is not possible to countenance that the Plaintiffs have made out any case that the Defendant No.2 was not a purchaser of the immovable property in good faith and for consideration as such. Indeed, I am conscious of the assertion in Para 13 of the Plaint, which reads thus :

> "..... (i) though the said purported Deed of Assignment made a mention of receipt of consideration of Rs.24,50,000/-, even the purported cheques for the said sum as mentioned in a separate letter purportedly executed by the Defendants No.1 on 17.9.1999 had not even been encashed on the date of the purported execution of the said purported Deed of Assignment, (ii) the Defendants No.2 actively aided and abetted the Defendants No.1 in the aforesaid act of the said fraudulent transfer of the said immovable property.....".

11. Besides the above averments, the case made out against Defendant No.2 in the Plaint, at best, is that the Defendant No.1, in collusion with Defendant Nos.2 and 3, after being aware of the filing of the Suit/O.A. by the Plaintiffs for the recovery of their dues by the Defendant No.1 and their guarantors, with sole object of defrauding

the creditors including the Plaintiffs, effected the said purported fraudulent transfer of the said immovable property in favour of the Defendant No.2. Further, the Defendant No.2 just two days prior to the hearing of the Plaintiffs' Interim Application before the D.R.T., chose to attend the office of the Defendant No.3 for admitting the purported execution of the purported Deed of Assignment for the purpose of the purported registration thereof. Beyond these assertions, no other case has been made out against the Defendant No.2 by the Plaintiffs. These assertions, to my mind, are short of making out a case that the Defendant No.2 is not a purchaser of the property in good faith and for consideration.

12. Nevertheless, the Defendant No.2 has filed reply affidavit before this Court and asserted that it is a bonafide purchaser of the immovable property in question without notice (good faith) and for consideration. In the affidavit, it is asserted that before entering into the transaction, the Defendant No.2 took necessary search in all relevant records in relation to the immovable

property, including search taken from the records of the Registrar of Companies, Maharashtra relating to the first Defendant Company to satisfy that the first Defendant Company had not created any charge on the said property. The Defendant No.2 has also asserted that it had taken inspection from Defendant No.1 of the original Sale Deed dated 2nd September 1974 executed by Joseph Barney Fonseca in favour of M/s.K.C.Brothers, by which the said M/s.K.C.Brothers purchased the said entire immovable property admeasuring 1070.2 square meters. It is stated that only after being satisfied that the title of M/s.K.C.Brothers as sole owners of the said larger property obtained for over 25 years, the Defendant No.2 went ahead to purchase the right, title and interest of Defendant No.1 under the said Deed of Assignment dated 17th September 1999. Insofar as consideration for the stated transaction between Defendant No.1 and Defendant No.2 is concerned, the Defendant No.2 on affidavit has asserted that five cheques in the sum of Rs.4,00,000/- (Rupees Four Lakhs) each and six cheques in the sum of Rs.4,50,000/- (Rupees Four Lakhs Fifty Thousand) each, were made over to

Defendant No.1 and which cheques have been encashed as is evident from the passbooks issued by their bankers-Union of India, issued on 21st September 2001. It is also asserted that the first Defendant had put the Defendant No.2 in possession of the suit property on 17th September 1999 at the time of execution of the Deed of Assignment itself.

13. Be that as it may, in the present case, even accepting the case of the Plaintiffs as it is, it is not possible to take the view that after the institution of the Suit in this Court being Suit No.4880 of 1998, immediately the same was served on the Defendant No.1 by the Plaintiffs. That is not the case made out by the Plaintiffs. Interestingly, it is not the case of the Plaintiffs that the order of injunction dated 14th October 1999 was ever served on the Defendant No.1. Whereas, the specific case of the Plaintiffs is that the order of injunction was communicated to the City Survey Office. It is not in dispute that in the former Suit filed by the Plaintiffs, the City Survey Officer or any other Government Official or Authority were not made party

Defendant. No injunction order was passed against any such Official. On the other hand, the Deed of Assignment in relation to the suit property came to be executed between Defendant No.1 and Defendant No.2 on 17th September 1999 and presented for registration and admitted by Defendant No.2 on 7th October 1999 which is much prior to the order of injunction dated 14th October 1999. It is therefore not a case of transaction in favour of third party after the order of injunction as such. Reliance has been rightly placed by the Counsel for the Defendant No.2 on the decision of the Apex Court in the case of **A.Venkatasubbiah Naidu vs. S.Chellappan & Ors. reported in AIR 2000 SC 3032.** In Para 13 of this decision, the well established legal position is restated that service of order of ex-parte interim injunction on the opposite party in terms of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 is imperative. If a party in whose favour such ex-parte order has been passed, fails to comply with his obligation to serve the opposite party in the manner as well as specified time, runs the risk of non-compliance. On these findings, reliance placed on the decision of the Division

Bench of our High Court by the Plaintiffs in the case of **Keshrimal Jivji Shah & Anr. v. Bank of Maharashtra & Ors. reported in 2004 Vol.106(3) Bom.L.R. 969** is inapposite. In that case, the question considered was whether transfer of an immovable property "in contravention of a prohibitory or injunction order of a Court" is illegal or void? In the present case, however, at best, the case of the Plaintiffs can be one of transfer effected in favour of Defendant No.2 by the Defendant No.1 in anticipation of some proceedings to be taken out by the Plaintiffs against the Defendant No.1 or likelihood of order of injunction being passed against it. It is not a case of transfer of the immovable property inspite of an order of injunction as such.

14. Going by the pleadings on record, therefore, at this stage of the proceedings, I have no hesitation in taking the view that the Defendant No.2 is purchaser of the suit property in good faith and for consideration. On this finding, it will necessarily follow that the Plaintiffs cannot succeed in getting the declaration as pressed in

the Plaint.

15. To get over the above position, Counsel for the Plaintiffs would argue that the case made out by the Defendant No.2 in Para 10(e) of the reply affidavit that it had taken all efforts to search the relevant records before entering into Assignment Deed, is afterthought. That such a plea has been taken for the first time before this Court. No such case was even remotely suggested in the proceedings before the D.R.T. including the application moved by the Defendant No.2 for vacating the order of injunction.

16. This argument does not commend to me. In the first place, no specific case has been made out in the Plaint that the Defendant No.2 proceeded with the transaction without even bothering to take search or insist for the original documents in favour of the Defendant No.1. The mere fact that the plea regarding prior search taken by the Defendant No.2 has not been specifically adverted to in the proceedings before the D.R.T. or any prior correspondence, that does not take the matter

any further.

17. For the Plaintiffs to succeed, it is imperative for them to allege and prove that the transfer of immovable property in question has been made by Defendant No.1 in favour of Defendant No.2 with intent to defeat or delay the creditors of the Defendant No.1. The legal position about the sweep of Section 53 of the Act is no more *res integra*. The Privy Council in the case of **Mina Kumari Bibi v. Bijoy Singh Dudhuria reported in AIR 1916 Privy Council 388** has observed that if the transaction was to be really subsequent to attachment, then there would be a justification for finding of fraud mere setting up of collusion and fictitious nature of the transaction is only a case of Benami, which is distinct from fraudulent transaction. It is observed that a debtor, for all that is contained in Section 53 of the Act, may pay his debt in any order he pleases and prefer any creditor he chooses and whatever may be suspected, and however slender the confidence that the person may inspire, if there is no evidence on which any fraudulent intention can be imputed, that will not fall within

the sweep of Section 53 of the Act. The abovesaid Privy Council decision is followed by the Madras High Court in the case of **Sharfuniya Begum Sahiba v. (Sayyad) Pacha Sahib & Ors. reported in AIR 1928 Mad.793**. Significantly, in that case, the property was transferred in favour of wife by her husband for consideration. The wife asserted that as she was the owner of the property, that property was not liable to be attached for proceeding against her husband in respect of outstanding claim. The Court has noted that the case of the opposite party was not that the Sale Deed was merely nominal, or, in other words, was a sham and that, though there was an apparent transfer of title, still the title itself continued with the husband. Moreover, the finding recorded by the lower Court was that it was a transaction in fraud of creditors. The Court went on to observe that the consideration for the sale has been found by both the Courts. That, mehar debt due to the Plaintiff has been found to be true, though it is not clear how much was due to the Plaintiff from Defendant No.1 in respect of the mehar and whether at the time of the stated transaction, there was

still due and payable any interest therefor. On this basis, the Court proceeded to hold that if, therefore, there was consideration, no question of the adequacy of the consideration does arise or can arise in the case on hand because there is no plea on the part of the Defendants that the document, while it was in the part good and proper and for consideration, was for the other part merely nominal, there being a resulting trust in favour of the Defendant No.1 in respect of such portion. The Court then went on to observe that the case of fraud of creditors must be distinctly alleged and proved. The burden of proving it is on the creditors to allege it apart from clause (2) of Section 53 of the Act, because otherwise, the Court finding the transaction to be supported by consideration and proved by a registered deed would be bound to give effect to it and support it. The Madras High Court while referring to Privy Council decision adverted to earlier decision, has restated the legal position that however suspicious transaction may be, there must be evidence on which fraudulent intention must be made out.

18. My attention is rightly invited by the Counsel for the Defendant No.2 to another decision of the Allahabad High Court in the case of **(Sahu) Nand Kishore vs. Shadi Ram & Ors. reported in AIR 1926 All.457**. In that case, the Court was called upon to consider whether the Sale Officer had any jurisdiction to proceed with the sale after an order for stay had been passed in an appeal pending from the decree, then under execution; and whether there had been any material irregularity in publishing or conducting the sale and had any material injury resulted therefrom. While considering the said question, the Allahabad High Court has noted the distinction between an order of stay and an order of injunction. Insofar as the order of stay passed by the Appellate Court is concerned, that is an order to a Subordinate Court to stay its hands. Whereas, in the case of order of injunction, it is against a party to refrain from doing a certain act. The former takes effect from the time of its pronouncement, and its communication is only needed to make it known to the Court which is directed to carry it out. Whereas, an injunction is binding on the party to

whom it is issued from the time it is communicated. The Court has then found that there should be no attempt unless the party concerned knows what he is required to do or to abstain from doing, and a Court cannot punish a man for doing what he did not know he was forbidden to do. In the present case, nowhere in the Plaint it is mentioned that the order passed by the D.R.T. on 14th October 1999 was communicated to the Defendant No.1 who was party to the said proceedings. Communication sent to the Office of City Survey Officer would be of no avail. The Defendant No.1 can be said to have known that he is forbidden from transferring the immovable property in question only upon service of the order of injunction or communication thereof by the Plaintiffs. In the present case, it is obvious that the Assignment Deed in favour of Defendant No.2 was executed by Defendant No.1, much before the order of injunction was passed or for that matter, communicated to the Defendant No.1.

19. Counsel for the Defendant No.2 has rightly relied on the exposition of the Apex Court in the case of **Hamda Ammal v. Avadiappa Pathar & 3 Ors.**

reported in (1991) 1 SCC 715. Even in that case, Sale Deed was executed in favour of Hamda Ammal on September 9, 1970 which was registered on October 26, 1970. Before registration of the Sale Deed, however, the Respondent Avadiappa Pathar had filed money suit for recovery against vendors and obtained order of attachment on September 17, 1970. Obviously, the Suit came to be filed as well as order of attachment issued only after the Sale Deed was executed in favour of Hamda Ammal on September 9, 1970. In the backdrop of these facts, in Para 6, the Apex Court went on to observe that the property in question admittedly belonged to the Judgment debtor and once it is held that the Sale Deed had already been executed by them in favour of Hamda Ammal on September 9, 1970 and only its registration remained, then neither the attachment before judgment nor a subsequent attachment or court sale in favour of Respondent 5 can confer any title in his favour by preventing the relation back. It is further observed that if the document of Sale has not been registered until after the attachment, it makes no difference. This exposition applies on all fours to the case on

hand.

20. Counsel for the Plaintiffs would, however, rely on the decision of the Apex Court in the case of **Ram Saran Lall & Ors. v. Mst.Domini Kuer & Ors. reported in AIR 1961 SC 1747**, wherein the Apex Court considered the efficacy of Section 61 of the Registration Act. It has observed that the registration under the Registration Act is not complete till the document to be registered has been copied out in the records of the Registration Office as provided in Section 61 of that Act. Relying on this decision, it was argued that in the present case, no registration has been recorded as required by Section 61 of the Act. That, however, will make no difference to the indefeasible right of the Defendant No.2; if the Defendant No.2 were to establish that the transfer of the immovable property in question in its favour was in good faith and for consideration. The second Clause of Section 53(1) of the Act would come to the aid of Defendant No.2 and the concomitant thereof will be to deny relief to the Plaintiffs. In other words, the Plaintiffs cannot succeed merely by alleging

that the transfer of immovable property made by the transferor was with intent to defeat or delay the creditors of the transferors, in the action which is founded on Section 53 of the Act. It is further necessary to examine as to whether the status of the transferee was or was not in good faith and for consideration.

21. According to the Plaintiffs there was strong circumstance to indicate that the transaction between Defendant No.1 and Defendant No.2 in relation to the suit property was fraudulent. Inasmuch as, the estimated market value of the suit property was over Rs.1 crore at the relevant time but the same has been transferred in favour of Defendant No.2 for a meagre amount of Rs.24,50,000. This submission will have to be overturned relying on the expositions in the decisions which are already referred to earlier. For, adequacy of consideration cannot be the basis to judge the case of the Plaintiffs founded on Section 53 of the Transfer of Property Act. [See **Sharfuniya Begum Sahiba (supra)**. Also see **Rajender**

Singh v. Ramdhar Singh & Ors. reported in 2001(6) SCC 213 - Paras 12 and 19 thereof).

22. That takes me to the argument of the Plaintiffs that the circumstances referred to in Para 27 of the Plaint individually and/or together, leave no manner of doubt that the transfer of immovable property by the Defendant No.1 in favour of Defendant No.2 was with intent to defeat or delay the creditors. I am not at all impressed with this argument. The fact that the Deed of Assignment dated 17th September 1999 was executed on a non-judicial stamp paper of Rs.100/- (Rupees One Hundred) only, by itself, is of no consequence. Insofar as the second circumstance highlighted by the Plaintiffs that there is no mention about the consideration amount having been received by cash or cheque, also deserves to be stated to be rejected. The Deed of Assignment acknowledges the payment of amount referred to therein by the Defendant No.2 to Defendant No.1. The Defendant No.2 has produced material to support the stand that the bank account of Defendant No.2 was proportionately debited by its bankers. That

obviously means that the transfer was for consideration. The third circumstance that the transfer was for meagre consideration, also will have no bearing on the question as to whether the transfer was fraudulent within the meaning of Section 53 of the Act. The fourth circumstance that the cheques were not encashed on the relevant date when the Deed of Assignment was executed between the parties on 17th September 1999 also is of no consequence. The Defendant No.2 has stated on affidavit that it was agreed that the execution of document will be admitted only after the cheques were realised. The cheques were realised on 21st September 2001. It is only thereafter, the first Defendant admitted execution of the said Deed of Assignment before the Registrar of Assurances at Mumbai on 7th October 1999. This circumstance cannot be considered as a suspicious circumstance, much less, to draw inference of fraud. The Defendant No.1 and Defendant No.2 are separate juristic persons. There is nothing in the Plaint to suggest that the transaction between the parties was only a paper transaction. Insofar as the 5th and 8th circumstances that the Income-tax Clearance

Certificate under Section 230A of the Income-tax Act was not obtained at the time of lodgment of Deed of Assignment, makes no difference. It is not unknown that the contract between the parties can be concluded, subject to obtaining Clearance Certificate from the appropriate authorities. The Clearance Certificate, if were to be granted at the subsequent point of time, will not render the transaction doubtful or so to say fraudulent. To my mind, this is an issue of challenging the registration of the document, which cannot be considered at the instance of the Plaintiffs. The next circumstance is that the order passed by the D.R.T. on 14th October 1999 was communicated by the Plaintiffs to the City Survey Officer on 19th November 1999 and entry thereof was also recorded by the City Survey Officer on 3rd December 1999 and inspite of that, the registration of the document was proceeded. Even this circumstance does not take the matter any further. The fact remains that the Deed of Assignment has been executed between Defendant Nos.1 and 2 and lodged for registration on 7th October 1999, much before the order of D.R.T. came to be passed on 14th October 1999.

Besides, there was no order of injunction against the Officials of the City Survey Office. The fact that noting has been made in the record about passing of order of injunction by D.R.T. cannot be the basis to infer that the transaction is fraudulent. In any case, the Defendant No.2 cannot be responsible for the situation, unless this Court were to hold that transfer in favour of Defendant No.2 was not in good faith and for consideration.

23. Even the 7th, 9th, 10th and 11th circumstances that the Office of Defendant No.3 was also informed about the order of injunction by Plaintiffs' letters dated 11th January 2000 and 27th January 2000, are of no avail. The attempt of the Plaintiffs is to allege that the Defendant No.3 had acted in collusion with Plaintiffs. The allegation of collusion or bias by the Official can be taken to its logical end only if the Plaintiffs were to join the concerned Official at the relevant time by name as Defendant. In absence of the said Official named as Defendant in the present proceedings, those allegations cannot be looked into. The last circumstance in Para 27(xii)

pressed into service is of inadequacy of consideration for the immovable property in question paid by the Defendant No.2. I have already dealt with this aspect in the earlier part of the Order. Taking overall view of the matter, therefore, it is not possible to hold that the Plaintiffs have made out any case for grant of relief.

24. The next question is whether the Plaintiffs will suffer irreparable loss in the event the interim relief as prayed was to be refused. In my opinion, even this issue will have to be answered against the Plaintiffs. For, if the Plaintiffs were to succeed in the Suit, consequential orders can be passed. That obviously means that any further development of the suit property can be reckoned at the end of the trial. Even the issue of balance of convenience will have to be answered against the Plaintiffs for more than one reason. The Defendant No.2 has rightly contended that going by the assertion of the Plaintiffs in Paragraph 7 of the Plaint, they became aware of the possibility of transfer of the

property of Defendant No.1 in the first week of October 1999. Nowhere, it is stated that the Plaintiffs had served copy of the Plaint on the Defendant No.1. Besides, the order of injunction which came to be passed by the D.R.T. on 14th October 1999 has not been served on the Defendant No.1. Instead, the public notice was given in the Indian Express only on 29th January 2001 and the present Suit has been filed on 7th February 2002. Whereas, there was concluded contract between the Defendant No.1 and Defendant No.2 on 17th September 1999 itself. The Defendant No.2 has purchased the right, title, interest in the immovable properties in question in good faith and for consideration.

For all these reasons, the balance of convenience is in favour of Defendant No.2.

25. Accordingly, the prayer for interim relief as articulated in the Notice of Motion under consideration cannot be granted. Hence, the Notice of Motion is dismissed with costs in cause.

26. It is made clear that the finding reached

herein is only to consider the prayer for interim relief. The Suit will proceed on its own merits in accordance with law, uninfluenced by such findings.

27. After the order was pronounced in Court, Counsel for the Plaintiffs asked for continuation of interim relief for some time to enable the Plaintiffs to carry the matter in Appeal. Although the request is opposed, I find it expedient to grant this limited indulgence to the Plaintiffs. Accordingly, ad-interim order to continue for a period of four weeks from today.

A.M.KHANWILKAR, J.